Senate Bill No. 2106

Passed the Senate	August 25, 2000
	Sagardam of the Sanata
	Secretary of the Senate
Passed the Assembly	August 21, 2000
	Chief Clerk of the Assembly
This bill was receiv	ed by the Governor this day
of	, 2000, at o'clockM.
	Private Secretary of the Governor

CHAPTER _____

An act to add Section 11492.6 to the Health and Safety Code, and to amend Sections 502.01 and 653v of, and to add Section 186.85 to, the Penal Code, relating to asset forfeiture.

LEGISLATIVE COUNSEL'S DIGEST

SB 2106, Lewis. Criminal profiteering: asset forfeiture.

(1) Existing law includes various statutory schemes that authorize the forfeiture of assets used in connection with the commission of specified offenses. The California Control of Profits of Organized Crime Act provides for the forfeiture of assets of any person convicted of engaging in a pattern of criminal profiteering activity as defined. Other provisions authorize the seizure and forfeiture of property that is illegal telecommunications equipment or other computer-related systems, software or data, if used to violate specified provisions of law prohibiting forgery, fraud, and theft; or property used in connection with the commission of the theft or misappropriation of sound recordings; or property used or intended to be used in violation of the Uniform Controlled Substances Act. With the exception of the provisions relating to the theft or misappropriation of sound recordings, under the other schemes, property owned by innocent owners, as defined, is exempt from forfeiture. Innocent owners are given notice and a hearing to prove the validity of their claim of ownership in the property.

This bill would impose liability on the agency responsible for the seizure of the property, for damages caused to seized property while in the possession of a law enforcement officer if that property was seized for purposes of forfeiture. This liability would not extend to property that is contraband and this remedy would not be available to a person who is charged with the underlying

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criminal offense for which the property is subject to forfeiture.

(2) Under existing asset forfeiture law relating to telecommunications and computer crimes, if a minor commits a computer crime with a computer located in his or her parent's primary residence, the computer is subject to forfeiture. However, if the parent makes full restitution to the victim or signs a statement indicating that the minor will not have access to the home computer for 2 years, the computer is not subject to forfeiture unless the minor commits a subsequent computer-related offense within the following 2 years.

This bill would provide that if the minor who is convicted in an adult prosecution or is adjudicated to be a person who comes within the jurisdiction of the juvenile court for a specified offense, commits a subsequent computer offense within the 2 years following the commission of the first offense, the computer used to commit the first offense would still not be subject to forfeiture if the parent made restitution to the victim and the computer used to commit the 2nd offense was not located in the parent's primary residence.

(3) This bill would incorporate additional changes in Section 502.01 of the Penal Code proposed by AB 1767, that would become operative only if AB 1767 and this bill are both chaptered and become effective January 1, 2001, and this bill is chaptered last.

The people of the State of California do enact as follows:

SECTION 1. Section 11492.6 is added to the Health and Safety Code, to read:

11492.6. (a) A law enforcement agency shall be liable for the actual damages caused by the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of a law enforcement officer employed by that agency, if that property was seized for the purpose of forfeiture under this chapter.

(b) A law enforcement agency shall not be liable under subdivision (a) to a person who is convicted of the

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underlying criminal offense for which the property was subject to forfeiture under this chapter.

- SEC. 2. Section 186.85 is added to the Penal Code, to read:
- 186.85. (a) A law enforcement agency shall be liable for the actual damages caused by the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of a law enforcement officer employed by that agency, if that property was seized for the purpose of forfeiture under this chapter.
- (b) A law enforcement agency shall not be liable under subdivision (a) to a person who is convicted of the underlying criminal offense for which the property was subject to forfeiture under this chapter.
- SEC. 3. Section 502.01 of the Penal Code is amended to read:
 - 502.01. (a) As used in this section:
- (1) "Property subject to forfeiture" means any property the defendant that is illegal telecommunications equipment as defined in subdivision (g) of Section 502.8, or a computer, computer system, or computer network, and any software or data residing thereon, if the telecommunications device, computer, computer system, or computer network was used in committing a violation of Section 470, 470a, 472, 476, 480, or subdivision (b) of Section 484e, subdivision (d) of Section 484e, subdivision (a) of Section 484f, subdivision (b) of Section 484i, subdivision (c) of Section 502, or Section 502.7, 502.8, 529, 529a, or 530.5, or was used as a repository for the storage of software or data obtained in violation of those provisions. Forfeiture shall not be available for any property used solely in the commission of an infraction. If the defendant is a minor, it also includes property of the parent or guardian of the defendant.
- (2) "Sentencing court" means the court sentencing a person found guilty of violating Section 470, 470a, 472, 476, 480, or subdivision (b) of Section 484e, subdivision (d) of Section 484e, subdivision (a) of Section 484f, subdivision (b) of Section 484i, subdivision (c) of Section 502, or

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Section 502.7, 502.8, 529, 529a, or 530.5, or, in the case of a minor, found to be a person described in Section 602 of the Welfare and Institutions Code because of a violation of those provisions, the juvenile court.

- (3) "Interest" means any property interest in the property subject to forfeiture.
- (4) "Security interest" means an interest that is a lien, mortgage, security interest, or interest under a conditional sales contract.
 - (5) "Value" has the following meanings:
- (A) When counterfeit items of computer software are manufactured or possessed for sale, the "value" of those items shall be equivalent to the retail price or fair market price of the true items that are counterfeited.
- (B) When counterfeited but unassembled software components of computer packages recovered, including, but not limited to, counterfeited computer diskettes, instruction manuals, or licensing envelopes, the "value" of those components of computer software packages shall be equivalent to the retail price or fair market price of the number of completed computer software packages that could have been made from those components.
- (b) The sentencing court shall, upon petition by the prosecuting attorney, at any time following sentencing, or by agreement of all parties, at the time of sentencing, conduct a hearing to determine whether any property or property interest is subject to forfeiture under this section. the forfeiture hearing, the prosecuting attorney shall have the burden of establishing, by a preponderance of the evidence, that the property or forfeiture. The interests are subject to prosecuting attorney may retain seized property that may be subject to forfeiture until the sentencing hearing.
- (c) Prior to the commencement of a forfeiture proceeding, the law enforcement agency seizing the property subject to forfeiture shall make an investigation as to any person other than the defendant who may have an interest in it. At least 30 days before the hearing to determine whether the property should be forfeited, the

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prosecuting agency shall send notice of the hearing to any person who may have an interest in the property that arose before the seizure.

A person claiming an interest in the property shall file a motion for the redemption of that interest at least 10 days before the hearing on forfeiture, and shall send a copy of the motion to the prosecuting agency and to the probation department.

If a motion to redeem an interest has been filed, the sentencing court shall hold a hearing to identify all persons who possess valid interests in the property. No person shall hold a valid interest in the property if, by a preponderance of the evidence, the prosecuting agency shows that the person knew or should have known that the property was being used in violation of Section 470, 470a, 472, 476, 480, or subdivision (b) of Section 484e, subdivision (d) of Section 484e, subdivision (a) of Section 484f, subdivision (b) of Section 484i, subdivision (c) of Section 502, or Section 502.7, 502.8, 529, 529a, or 530.5, and that the person did not take reasonable steps to prevent that use, or if the interest is a security interest, the person knew or should have known at the time that the security interest was created that the property would be used for a violation.

- (d) If the sentencing court finds that a person holds a valid interest in the property, the following provisions shall apply:
- (1) The court shall determine the value of the property.
- (2) The court shall determine the value of each valid interest in the property.
- (3) If the value of the property is greater than the value of the interest, the holder of the interest shall be entitled to ownership of the property upon paying the court the difference between the value of the property and the value of the valid interest.

If the holder of the interest declines to pay the amount determined under paragraph (2), the court may order the property sold and designate the prosecutor or any other agency to sell the property. The designated agency

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shall be entitled to seize the property and the holder of the interest shall forward any documentation underlying the interest, including any ownership certificates for that property, to the designated agency. The designated agency shall sell the property and pay the owner of the interest the proceeds, up to the value of that interest.

- (4) If the value of the property is less than the value of the interest, the designated agency shall sell the property and pay the owner of the interest the proceeds, up to the value of that interest.
- (e) If the defendant was a minor at the time of the offense, this subdivision shall apply to property subject to forfeiture that is the property of the parent or guardian of the minor.
- (1) The prosecuting agency shall notify the parent or guardian of the forfeiture hearing at least 30 days before the date set for the hearing.
- (2) The computer or telecommunications device shall not be subject to forfeiture if the parent or guardian files a signed statement with the court at least 10 days before the date set for the hearing that the minor shall not have access to any computer or telecommunications device owned by the parent or guardian for two years after the date on which the minor is sentenced.
- (3) If the minor is convicted in an adult prosecution or is adjudicated to be a person to come within the jurisdiction of the juvenile court for the commission of a violation of Section 470, 470a, 472, 476, 480, or subdivision (b) of Section 484e, subdivision (d) of Section 484e, subdivision (a) of Section 484f, subdivision (b) of Section 484i, subdivision (c) of Section 502, or Section 502.7, 502.8, 529, 529a, or 530.5, within two years after the date on which the minor was subject to the disposition of the juvenile court, and the violation involves a computer or telecommunications device owned by the parent or guardian, the original property subject to forfeiture, and the property involved in the new offense, shall be subject to forfeiture notwithstanding paragraph (2).
- (4) Notwithstanding paragraph (3), if the minor is convicted in an adult prosecution or is adjudicated to be

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a person to come within the jurisdiction of the juvenile court for the commission of a violation of this section or Section 470, 470a, 472, 476, 480, or subdivision (b) of Section 484e, subdivision (d) of Section 484e, subdivision (a) of Section 484f, subdivision (b) of Section 484i, subdivision (c) of Section 502, or Section 502.7, 502.8, 529, 529a, or 530.5, within two years after the date on which the minor was subject to the disposition of the juvenile court for an offense under this section, the property involved in the prior offense shall not be subject to forfeiture if the parent made restitution to the victim of the first offense and the second offense was not committed with a telecommunications device or computer located in the parent's primary residence.

- (5) Notwithstanding paragraph (1), (2), or (3), or any other provision of this chapter, if a minor's parent or guardian makes full restitution to the victim of a crime enumerated in this chapter in an amount or manner determined by the court, the forfeiture provisions of this chapter do not apply to the property of that parent or guardian if the property was located in the family's primary residence during the commission of the crime.
- (f) Notwithstanding any other provision of this chapter, the court may exercise its discretion to deny forfeiture where the court finds that the convicted defendant, or minor adjudicated to come within the jurisdiction of the juvenile court, is not likely to use the property otherwise subject to forfeiture for future illegal acts.
- (g) If the defendant is found to have the only valid interest in the property subject to forfeiture, it shall be distributed as follows:
- (1) First, to the victim, if the victim elects to take the property as full or partial restitution for injury, victim expenditures, or compensatory damages, as defined in paragraph (1) of subdivision (e) of Section 502. If the victim elects to receive the property under this paragraph, the value of the property shall be determined by the court and that amount shall be credited against the restitution owed by the defendant. The victim shall not

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be penalized for electing not to accept the forfeited property in lieu of full or partial restitution.

- (2) Second, at the discretion of the court, to one or more of the following agencies or entities:
 - (A) The prosecuting agency.
- (B) The public entity of which the prosecuting agency is a part.
- (C) The public entity whose officers or employees conducted the investigation resulting in forfeiture.
- (D) Other state and local public entities, including school districts.
 - (E) Nonprofit charitable organizations.
- (h) If the property is to be sold, the court may designate the prosecuting agency or any other agency to sell the property at auction. The proceeds of the sale shall be distributed by the court as follows:
- (1) To the bona fide or innocent purchaser or encumbrancer, conditional sales vendor, or mortgagee of the property up to the amount of his or her interest in the property, if the court orders a distribution to that person.
- (2) The balance, if any, to be retained by the court, subject to the provisions for distribution under subdivision (g).
- (i) (1) A claimant of seized property alleged in the complaint of forfeiture may move the court for immediate release of the property. The motion shall be in writing and shall be served upon the agency that seized the property. The court shall grant the motion after making all of the following findings:
- (A) The claimant has a valid possessory interest in the property.
- (B) Continued possession by the government will cause substantial hardship to the claimant.
- (C) The hardship to the claimant outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the forfeiture proceedings.
- (2) Paragraph (1) shall not apply to property that is owned by a person charged with the underlying criminal offense for which the property is subject to forfeiture.

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- (j) (1) A law enforcement agency shall be liable for the real damages caused by the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of a law enforcement officer employed by that agency, if that property was seized for the purpose of forfeiture under this section.
- (2) A law enforcement agency shall not be liable under paragraph (1) to a person who is convicted of the underlying criminal offense for which the property was subject to forfeiture under this section.
- SEC. 3.5. Section 502.01 of the Penal Code is amended to read:

502.01. (a) As used in this section:

- (1) "Property subject to forfeiture" means any property of the defendant that is illegal telecommunications equipment as defined in subdivision (g) of Section 502.8, or a computer, computer system, or computer network, and any software or data residing thereon, if the telecommunications device, computer, computer system, or computer network was used in committing a violation of, or a conspiracy to commit a violation of Section 422, 470, 470a, 472, 475, 476, 480, 483.5, 484g, or subdivision (a), (b), or (d) of Section 484e, subdivision (a) of Section 484f, subdivision (b) or (c) of Section 484i, subdivision (c) of Section 502, or Section 502.7, 502.8, 529, 529a, or 530.5, 537e, 593d, 593e, or 646.9, or was used as a repository for the storage of software or data obtained in violation of those provisions. Forfeiture shall not be available for any property used solely in the commission of an infraction. If the defendant is a minor, it also includes property of the parent or guardian of the defendant.
- (2) "Sentencing court" means the court sentencing a person found guilty of violating or conspiring to commit a violation of Section 422, 470, 470a, 472, 475, 476, 480, 483.5, 484g, or subdivision (a), (b), or (d) of Section 484e, subdivision (d) of Section 484e, subdivision (a) of Section 484f, subdivision (b) or (c) of Section 484i, subdivision (c) of Section 502, or Section 502.7, 502.8, 529, 529a, 530.5, 537e, 593d, 593e, or 646.9, or, in the case of a minor, found

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to be a person described in Section 602 of the Welfare and Institutions Code because of a violation of those provisions, the juvenile court.

- (3) "Interest" means any property interest in the property subject to forfeiture.
- (4) "Security interest" means an interest that is a lien, mortgage, security interest, or interest under a conditional sales contract.
 - (5) "Value" has the following meanings:
- (A) When counterfeit items of computer software are manufactured or possessed for sale, the "value" of those items shall be equivalent to the retail price or fair market price of the true items that are counterfeited.
- (B) When counterfeited but unassembled components of computer software packages recovered, including, but not limited to, counterfeited diskettes, instruction manuals, computer or envelopes, the "value" of those components of computer software packages shall be equivalent to the retail price or fair market price of the number of completed computer software packages that could have been made from those components.
- (b) The sentencing court shall, upon petition by the prosecuting attorney, at any time following sentencing, or by agreement of all parties, at the time of sentencing, conduct a hearing to determine whether any property or property interest is subject to forfeiture under this the forfeiture hearing, the prosecuting section. At attorney shall have the burden of establishing, by a preponderance of the evidence, that the property or interests are subject forfeiture. The to prosecuting attorney may retain seized property that may be subject to forfeiture until the sentencing hearing.
- (c) (1) Prior to the commencement of a forfeiture proceeding, the law enforcement agency seizing the property subject to forfeiture shall make an investigation as to any person other than the defendant who may have an interest in it. At least 30 days before the hearing to determine whether the property should be forfeited, the prosecuting agency shall send notice of the hearing to any

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person who may have an interest in the property that arose before the seizure.

- (2) A person claiming an interest in the property shall file a motion for the redemption of that interest at least 10 days before the hearing on forfeiture, and shall send a copy of the motion to the prosecuting agency and to the probation department.
- (3) If a motion to redeem an interest has been filed, the sentencing court shall hold a hearing to identify all persons who possess valid interests in the property. No person shall hold a valid interest in the property if, by a preponderance of the evidence, the prosecuting agency shows that the person knew or should have known that the property was being used in violation of, or conspiracy to commit a violation of, Section 311.1, 311.2, 311.3, 311.4, 311.5, 311.10, 311.11, 470, 470a, 472, 475, 476, 480, 483.5, 484g, or subdivision (a), (b), or (d) of Section 484e, subdivision (a) of Section 484f, subdivision (b) or (c) of Section 484i, subdivision (c) of Section 502, or Section 502.7, 502.8, 529, 529a, 530.5, 537e, 593d, 593e, or 646.9, and that the person did not take reasonable steps to prevent that use, or if the interest is a security interest, the person knew or should have known at the time that the security interest was created that the property would be used for a violation.
- (d) If the sentencing court finds that a person holds a valid interest in the property, the following provisions shall apply:
- (1) The court shall determine the value of the property.
- (2) The court shall determine the value of each valid interest in the property.
- (3) If the value of the property is greater than the value of the interest, the holder of the interest shall be entitled to ownership of the property upon paying the court the difference between the value of the property and the value of the valid interest.

If the holder of the interest declines to pay the amount determined under paragraph (2), the court may order the property sold and designate the prosecutor or any

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other agency to sell the property. The designated agency shall be entitled to seize the property and the holder of the interest shall forward any documentation underlying the interest, including any ownership certificates for that property, to the designated agency. The designated agency shall sell the property and pay the owner of the interest the proceeds, up to the value of that interest.

- (4) If the value of the property is less than the value of the interest, the designated agency shall sell the property and pay the owner of the interest the proceeds, up to the value of that interest.
- (e) If the defendant was a minor at the time of the offense, this subdivision shall apply to property subject to forfeiture that is the property of the parent or guardian of the minor.
- (1) The prosecuting agency shall notify the parent or guardian of the forfeiture hearing at least 30 days before the date set for the hearing.
- (2) The computer or telecommunications device shall not be subject to forfeiture if the parent or guardian files a signed statement with the court at least 10 days before the date set for the hearing that the minor shall not have access to any computer or telecommunications device owned by the parent or guardian for two years after the date on which the minor is sentenced.
- (3) If the minor is convicted in an adult prosecution or is adjudicated to be a person to come within the jurisdiction of the juvenile court for the commission of a violation of or a conspiracy to commit a violation of, a section specified in paragraph (1) of subdivision (a), within two years after the date on which the minor was subject to the disposition of the juvenile court, and the violation involves a computer or telecommunications device owned by the parent or guardian, the original property subject to forfeiture, and the property involved in the new offense, shall be subject to forfeiture notwithstanding paragraph (2).
- (4) Notwithstanding paragraph (3), if the minor is convicted in an adult prosecution or is adjudicated to be a person to come within the jurisdiction of the juvenile

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court for the commission of a violation of, or a conspiracy to commit a violation of, this section or a section specified in paragraph (1) of subdivision (a), within two years after the date on which the minor was subject to the disposition of the juvenile court for an offense under this section, the property involved in the prior offense shall not be subject to forfeiture if the parent made restitution to the victim of the first offense and the second offense was not committed with a telecommunications device or computer located in the parent's primary residence.

- (5) Notwithstanding paragraph (1), (2), or (3), or any other provision of this chapter, if a minor's parent or guardian makes full restitution to the victim of a crime enumerated in this chapter in an amount or manner determined by the court, the forfeiture provisions of this chapter do not apply to the property of that parent or guardian if the property was located in the family's primary residence during the commission of the crime.
- (f) Notwithstanding any other provision of this chapter, the court may exercise its discretion to deny forfeiture where the court finds that the convicted defendant, or minor adjudicated to come within the jurisdiction of the juvenile court, is not likely to use the property otherwise subject to forfeiture for future illegal acts.
- (g) If the defendant is found to have the only valid interest in the property subject to forfeiture, it shall be distributed as follows:
- (1) First, to the victim, if the victim elects to take the property as full or partial restitution for injury, victim expenditures, or compensatory damages, as defined in paragraph (1) of subdivision (e) of Section 502. If the victim elects to receive the property under this paragraph, the value of the property shall be determined by the court and that amount shall be credited against the restitution owed by the defendant. The victim shall not be penalized for electing not to accept the forfeited property in lieu of full or partial restitution.
- (2) Second, at the discretion of the court, to one or more of the following agencies or entities:

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- (A) The prosecuting agency.
- (B) The public entity of which the prosecuting agency is a part.
- (C) The public entity whose officers or employees conducted the investigation resulting in forfeiture.
- (D) Other state and local public entities, including school districts.
 - (E) Nonprofit charitable organizations.
- (h) If the property is to be sold, the court may designate the prosecuting agency or any other agency to sell the property at auction. The proceeds of the sale shall be distributed by the court as follows:
- (1) To the bona fide or innocent purchaser or encumbrancer, conditional sales vendor, or mortgagee of the property up to the amount of his or her interest in the property, if the court orders a distribution to that person.
- (2) The balance, if any, to be retained by the court, subject to the provisions for distribution under subdivision (g).
- (i) (1) A claimant of seized property alleged in the complaint of forfeiture may move the court for immediate release of the property. The motion shall be in writing and shall be served upon the agency that seized the property. The court shall grant the motion after making all of the following findings:
- (A) The claimant has a valid possessory interest in the property.
- (B) Continued possession by the government will cause substantial hardship to the claimant.
- (C) The hardship to the claimant outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the forfeiture proceedings.
- (2) Paragraph (1) shall not apply to property that is owned by a person charged with the underlying criminal offense for which the property is subject to forfeiture.
- (j) (1) A law enforcement agency shall be liable for the real damages caused by the destruction, injury, or loss of goods, merchandise, or other property, while in the possession of a law enforcement officer employed by that

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agency, if that property was seized for the purpose of forfeiture under this section.

- (2) A law enforcement agency shall not be liable under paragraph (1) to a person who is convicted of the underlying criminal offense for which the property was subject to forfeiture under this section.
- SEC. 4. Section 653v of the Penal Code is amended to read:
- 653v. (a) Whenever any person is convicted of any violation of Section 653h, 653s, 653u, or 653w the court, in its judgment of conviction, shall, in addition to the therein prescribed, order the forfeiture destruction or other disposition of all articles, including, but not limited to, phonograph records, discs, wires, tapes, films, or any other article upon which sounds or images can be recorded or stored, and any and all electronic. mechanical, other devices or manufacturing, reproducing or assembling these articles, which were used in connection with, or which were part of, any violation of Section 653h, 653s, 653u, or 653w.
- (b) (1) If property is seized pursuant to this section, a claimant may move the court for immediate release of that property. The motion shall be in writing and shall be served on the agency that seized the property. The court shall grant the motion after making all of the following findings:
- (A) The claimant has a valid possessory interest in the property.
- (B) Continued possession by the government will cause substantial hardship to the claimant.
- (C) The hardship to the claimant outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the forfeiture proceedings.
- (2) Paragraph (1) shall not apply to property that is contraband or is property that is owned by a person charged with the underlying criminal offense for which the property is subject to forfeiture.
- (c) (1) A law enforcement agency shall be liable for the actual damages caused by the destruction, injury, or

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loss of goods, merchandise, or other property, while in the possession of a law enforcement officer employed by that agency, if the property was seized for the purpose of forfeiture under this section.

- (2) A law enforcement agency shall not be liable under paragraph (1) to a person who is convicted of the underlying criminal offense for which the property was subject to forfeiture under this section.
- SEC. 5. Section 3.5 of this bill incorporates amendments to Section 502.01 of the Penal Code proposed by both this bill and AB 1767. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2001, (2) each bill amends Section 502.01 of the Penal Code, and (3) this bill is enacted after AB 1767, in which case Section 3 of this bill shall not become operative.

Approved			_, 2000
		Gove	rnor